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THE WTO CONSISTENCY OF THE EUROPEAN UNION TIMBER REGULATION

**Dylan Geraets
Bregt Natens**



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ABSTRACT

The Timber Regulation is the EU's latest addition to its regulatory framework on forestry governance. This paper begins with an overview of the substantive provisions of the Regulation and then briefly addresses two comparable initiatives: the American Lacey Act and the Australian Illegal Logging Prohibition Bill. The second part of the paper focuses extensively on the WTO consistency of the Regulation, based on an analysis of Articles XI, III, and I GATT. In the view of the authors, although the EU Timber Regulation is likely to violate at least one substantive WTO provision, it is probably justifiable on the basis of Article XX GATT. The approach taken in the Timber Regulation may serve the EU in achieving non-trade objectives by restricting access to its market.

KEY WORDS

World Trade Organization, WTO, GATT, TBT, consistency, European Union Timber Regulation, illegal logging, legality verification

AUTHORS

Dylan Geraets is a PhD researcher at the Leuven Centre for Global Governance Studies (KU Leuven).

Bregt Natens is a PhD researcher at the Leuven Centre for Global Governance Studies (KU Leuven).

ADDRESS FOR CORRESPONDENCE

Dylan.Geraets@law.kuleuven.be

Bregt.Natens@ggs.kuleuven.be

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I. INTRODUCTION

On 3 March 2013, Regulation (EU) No 995/2010 (Timber Regulation) entered into force.¹ It aims at preventing the introduction of illegally logged timber into the market of the European Union (EU). The EU has been active in the fight against illegal logging for over a decade and the Timber Regulation is the latest step in the EU's efforts to put a halt to illegal logging practices. Already in 2003, the European Commission developed the Forest Law Enforcement, Governance, and Trade (FLEGT) Action Plan.² The Timber Regulation is to become the pinnacle in the execution of the Action Plan.

Illegal logging may be understood narrowly as harvesting timber without the required permits or in violation of granted permits. More broadly, it covers a wide range of illegal activities including harvesting, transport, processing and trade of timber, and evasion of fees and taxes related thereto, which have an impact on various issues.³ A joint United Nations Environmental Program (UNEP) and INTERPOL report points out that illegal logging accounts for 15-30% of all forestry products worldwide and 50-90% of all forestry products in key producer tropical countries.⁴ Aside from environmental issues, such as the depletion of forests and the destruction of wildlife habitat, and climate issues, such as the reduction of the absorption capacity for carbon emissions and the denuding of mountain slopes, illegal logging also has economic effects and an impact on trade.⁵ Hence, illegal logging causes a loss of revenue for governments in timber exporting countries, a loss of legitimate employment, and an increased risk of corruption. From an economic point of view, illegal logging distorts the market because it is cheaper than legitimate logging.⁶ Considering these undesirable results of illegal logging, most of which have clear global repercussions, there have been several initiatives to address illegal logging. On the one hand, private certification schemes (for example through the Forest Stewardship Council) were set up. In addition to these schemes, domestic forest programs were launched. To add to the complexities of the regulatory framework, certain supranational initiatives also address forest management. Interestingly, more recently forest management has seen the emergence of instruments that verify the legality of timber, such as the Timber Regulation.⁷

The first part of this paper examines the Timber Regulation and its position in EU timber governance. Additionally, two other legislative proposals dealing with the issue

¹ Regulation (EU) 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23 (Timber Regulation).

² Commission, 'Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan' COM (2003) 251 final.

³ M Pereira Goncalves et al, Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging (World Bank Study, World Bank 2012) 9-11.

⁴ C Nellemann (ed), Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests (United Nations Environmental Programme and INTERPOL 2012).

⁵ D Brack, 'Illegal Logging' (2007) Chatham House Briefing Paper, 1-2.

⁶ D Brack, 'Illegal Logging' (2007) Chatham House Briefing Paper, 2.

⁷ On the adequacy of legality verification, private schemes and domestic initiatives, see B Cashore and M Stone, 'Can Legality Verification Rescue Global Forest Governance?: Analyzing the Potential of Public and Private Policy Intersection to Ameliorate Forest Challenges in Southeast Asia' (2012) 18 Forest Policy and Economics 13, and the references there. See more generally on the regulatory framework of forest governance, including at the EU level, J Rayner, A Buck and P Katila (eds), 'Embracing Complexity: Meeting the Challenges of International Forest Governance' (World Series Volume 28, International Union of Forest Research Organizations 2010).

of illegal timber are addressed: the United States (U.S.) Lacey Act and the Australian Illegal Logging Prohibition Bill. These domestic legislative acts fit within the wider, international framework of regulation aimed at preserving exhaustible natural resources, including tropical or rain forests. Moreover, to a certain extent, all of these initiatives aim to implement the obligations these States have undertaken by virtue of their participation in a number of international initiatives that specifically aim to combat illegal logging. Nonetheless, concerns have been raised that these initiatives may not be consistent with the issuing state's obligations as a Member of the World Trade Organization (WTO). In the case of the EU, many provisions of the Timber Regulation have implications for international trade and it is not unlikely that in the (near) future another WTO Member may challenge the Timber Regulation. Therefore, the second part of this paper contains an analysis of the Timber Regulation's consistency with the EU's obligations under WTO law.

II. COMBATTING TRADE IN ILLEGAL TIMBER IN THE EUROPEAN UNION, THE UNITED STATES AND AUSTRALIA

A. EUROPEAN UNION: THE TWO PILLARS OF THE FLEGT ACTION PLAN

As stated, the EU adopted the FLEGT action plan in 2003 to address 'the growing problem of illegal logging and related trade', which was named as one of the European Commission's priorities. The action plan has led to both a licensing agreement based on Voluntary Partnership Agreements (VPAs) and, more recently, the mandatory Timber Regulation.

The voluntary licensing agreement was established by Council Regulation (EC) No 2173/2005 (FLEGT Regulation).⁸ Its licensing scheme shall be implemented through Voluntary Partnership Agreements (VPAs) with timber producing countries. FLEGT VPAs are bilateral agreements between the EU and timber exporting countries, which aim to guarantee that the wood exported to the EU has a legal source and to support partner countries in improving their own regulation and governance of the sector. Exporting countries commit themselves to establishing national licensing schemes that verify the legality of their shipments of timber and timber products to the EU. The EU has concluded six VPAs with timber exporting countries, with six other VPAs currently under negotiation.⁹ Once a VPA is in place, all covered timber and timber products exported from a partner country into the EU must comply in principle with the licensing system. Annex II of the FLEGT Regulation lists out a number of categories of timber products that are to be covered by all VPAs and their corresponding HS Tariff Classification headings.¹⁰ Individual VPAs may cover additional timber and timber products.¹¹

⁸ Council Regulation (EC) 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2005] OJ L347/1. The FLEGT Regulation is implemented by Commission Regulation (EC) 1024/2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 [2008] OJ L277/23.

⁹ Cameroon, the Central African Republic, Ghana, Indonesia, Liberia and the Republic of Congo (Brazzaville) have signed VPAs. The Democratic Republic of Congo, Gabon, Guyana, Honduras, Malaysia and Vietnam are currently negotiating.

¹⁰ These are: 4403 Wood in the rough, whether or not stripped of bark or sapwood, or roughly squared; 4406 Railway or tramway sleepers (cross-ties) of wood; 4407 Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm; 4408 Sheets for

The Timber Regulation was adopted on 20 October 2010 and entered into force on 3 March 2013. Its preamble reiterates that illegal logging is a pervasive problem of major international concern that contributes to deforestation and forest degradation, which is responsible for about 20% of global CO₂ emissions and threatens biodiversity. Moreover, it undercuts sustainable forest management and development, and it is a competitive disadvantage for timber that is legally logged. Furthermore, the preamble explains that the scale and urgency of illegal logging and related trade require a complement to and strengthening of the system of VPAs. In general, the Timber Regulation aims to address the economic, social, and environmental impacts of illegal logging. For that reason, it lays down obligations for operators who place timber and timber products on the internal market.¹² An operator is defined as any natural or legal person that places timber or timber products on the market. The market is defined as the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or for use in the course of a commercial activity.¹³ An operator is to be distinguished from a trader, who is any natural or legal person that, in the course of commercial activity, sells or buys timber or timber products already on the internal market.¹⁴ A guidance document issued by the European Commission contains more detailed definitions of terms used in the Timber Regulation.¹⁵

The key element of the Timber Regulation is that it prohibits the placing illegally harvested timber or timber products from such timber on the market.¹⁶ Hence, in essence, the Timber Regulation has important extraterritorial effects as it addresses issues and concerns that took place outside the territory of the EU.¹⁷ It is important to note that the Regulation does not prohibit importing illegally harvested timber as such and hence it is not, strictly speaking, a border measure. However, it must be noted that, contrary to the text of the Timber Regulation, the above-mentioned guidance document uses the term ‘importing’ instead of ‘placing on the market’. The question as to whether timber or timber products can be identified as illegally logged is left up to the country of harvest and has to be made on the basis of the applicable legislation in the country of harvest, whether this is inside or outside the EU.¹⁸ This may pose questions as to the WTO-consistency of the regulation, which we address *infra*.

veneering (including those obtained by slicing laminated wood), for plywood or for other similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm; and 4412 Plywood, veneered panels and similar laminated wood.

¹¹ For example, the VPA with Cameroon, also covers 4417 Tools, tool bodies, tool handles, broom or brush bodies and handles, in wood; boot or shoe lasts and trees of wood; 9403 30 Wooden furniture of a kind used in offices; 9403 40 Wooden furniture of a kind used in kitchens; 9403 50 Wooden furniture of a kind used in the bedroom; and 9403 60 Other wooden furniture.

¹² Timber Regulation, art 2 (a)-(b). Timber products covered by the Timber Regulation are listed in the Annex, with their corresponding HS Tariff Classification headings.

¹³ *ibid*, art 2 (c).

¹⁴ *ibid*, art 2 (d).

¹⁵ Commission, ‘Guidance Document for the EU Timber Regulation’ (2013) <<http://ec.europa.eu/environment/forests/pdf/Final%20Guidance%20document.pdf>> accessed 9 April 2013.

¹⁶ Timber Regulation, art 4.1.

¹⁷ L Ankersmit, J Lawrence and G Davies, ‘Diverging EU and WTO Perspectives on Extraterritorial Process Regulation’ (2012) 21 Minnesota Journal of International Law 14, 59.

¹⁸ Timber Regulation, art 2 (e)-(h).

Moreover, two categories of timber will automatically be considered legally harvested for the purposes of the Timber Regulation.¹⁹ The first category consists of timber embedded in timber products covered by VPAs, i.e. products originating in a VPA partner country and listed in the VPA. If these products comply with the requirements set out by the FLEGT Regulation and the corresponding implementing provisions, they shall be considered to have been legally harvested. The second category comprises of timber that is from species listed in Annex A, B, or C to Council Regulation (EC) No 338/97 (Wildlife Regulation)²⁰ and which complies with that Regulation and the corresponding implementing provisions. Such timber shall also be considered to have been legally harvested. The exemption of this category of timber from the application of the Timber Regulation is to be seen in the broader context of wildlife protection. Consequently, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is uniformly implemented in all EU Member States by means of the Wildlife Regulation.

CITES encompasses three appendices, each of which both contains a list of species and regulates trade.²¹ Species listed in Appendix I are endangered and may only be traded subject to conditions, one of which is that the primary purpose is not commercial. Appendix II contains the large majority of protected species. In order to trade these species, an export permit must be granted. The permit shall only be granted if export is not detrimental to the survival of the species—the so-called non-detriment finding—and if no laws have been violated in harvesting the species. Trade in species listed in the Appendix III is subject to the condition that no laws have been violated in harvesting the species. Moreover, if a State that has listed the species in Appendix 3 imports the species from an exporter in a State that has not listed them, only a certificate of origin from the latter State is required for trade to be allowed.

Instead of CITES' three categories, the Wildlife Regulation contains four categories of species, listed in Annexes A-D. For species listed in Annex A or B, which are all CITES Appendix I and II species, some Appendix III species, and some non-CITES species, the conditions for trade set out by the Wildlife Regulation are more restrictive than those prescribed by CITES. For example, an import permit is required for species listed in Annex A or B, and it is prohibited to conduct most commercial activities with regard to species listed in Annex A.

Concerning all other timber and timber products, operators are subjected to a due diligence obligation, which they may devise themselves, based on the framework

¹⁹ *ibid*, art 3.

²⁰ Council Regulation (EC) 338/97 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1. The Wildlife Regulation has, in its turn, been implemented by Commission Regulation (EC) 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein [2006] OJ L166/1; Commission Recommendation 2007/425/EC identifying a set of actions for the enforcement of Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein [2007] OC L159/45; Commission Implementing Regulation (EU) 757/2012 suspending the introduction into the Union of specimens of certain species of wild fauna and flora [2012] OJ L223/31; and Commission Implementing Regulation (EU) 792/2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein [2012] OJ L242/13.

²¹ CITES, arts II:4, III, IV, and V.

contained in the Timber Regulation.²² Alternatively, a monitoring organization may provide a due diligence system and grant operators a right to use them.²³ The due diligence system requires operators to keep track of information related to the marketing of timber or timber products. Furthermore, it contains risk assessment and risk mitigation procedures enabling the operator to analyze the risk of illegally harvested timber or timber products derived from such timber being placed on the market. Aside from operators, traders are also subjected to obligations. They must also be able to identify throughout the supply chain: a) the operator or traders who have supplied the timber and timber products and b) where applicable, the traders to whom they have supplied timber and timber products. This traceability obligation requires the relevant information to be kept for at least five years and to be made available to the relevant authorities upon request.²⁴

In order to safeguard the application of the Timber Regulation, every EU Member State is to designate competent authorities, which are to check whether operators fulfill their due diligence obligations.²⁵ EU Member States must provide for penalties in case of a violation of the due diligence obligations. These penalties are to be effective, proportionate, and dissuasive.²⁶

B. UNITED STATES: LACEY ACT

In 2008, U.S. Congress amended the environmental Lacey Act of 1900 by substantially expanding its scope regarding flora to explicitly include trees and adding a system of mandatory import declarations.²⁷ Plants are defined as any wild member of the plant kingdom, including roots, seeds, parts, and products thereof, and including trees from either natural or planted forest stands.²⁸ The Lacey Act prohibits the import, export, transport, sale, reception, acquisition, purchase in interstate or foreign commerce, or possession of any plant taken, possessed, transported, or sold in violation of any law or regulation of any relevant U.S. State or foreign law which protects plants or regulates their export.²⁹ Additionally, it is prohibited to import any plant without filing an import declaration.³⁰ A violation of these obligations can be punished with imprisonment for up to five years, a penalty up to 500,000US\$ per violation, or both, per offence.³¹ Penalties are dependent on whether the importer knowingly or unknowingly violated the Lacey Act, and on which obligation is violated.

²² *ibid*, arts 4.2-4.3 and 6.1.

²³ *ibid*, arts 4.3, and 8. Also see Commission Delegated Regulation (EU) 363/2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation (EU) No 995/2010 [2012] OJ L115/12.

²⁴ Timber Regulation, art 5.

²⁵ *ibid*, arts 7 and 10-12. Also see Commission Implementing Regulation (EU) 607/2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 [2012] OJ L177/16, which stipulates, *inter alia*, the term within which the due diligence system shall be applied by operators, the way in which the information has to be supplied by the operator, the way in which risk assessment and mitigation procedures have to be carried out, and the frequency and nature of checks on monitoring organizations.

²⁶ Timber Regulation, art 19.

²⁷ Chapter 53 of Title 16 United States Code (Lacey Act). The relevant provisions are paras 3371-3378.

²⁸ Lacey Act, para 3371(f) (1).

²⁹ Lacey Act, paras 3372 (a) (2) (B), (3) (B), and (4). The exact content laws or regulations which may not be violated is listed under para 3372 (a) (2) (B).

³⁰ *ibid*, paras 3372 (f) (1)-(3).

³¹ *ibid*, paras 3373 (a) and (d).

Hence, a company is required to exercise due diligence by devising its own system. However, complying with those requirements does not lead to impunity: a civil fine of up to 250\$ and forfeiture of the goods remain possible even if U.S. officials consider that the company's due diligence system was sufficient and it was properly executed.³² Enforcement of the Lacey Act is conferred to the Secretaries of Agriculture, the Interior, Commerce, Transportation, or the Treasury.³³

It has been noted by several scholars that the Lacey Act is unlikely to give rise to a WTO challenge as it is not a border measure and applies equally to imported and domestic plants.³⁴ Not all authors agree: Tanczos argues that the import declaration may cause WTO issues as it affects imported goods only and increases costs for importers. Moreover, the Lacey Act confers different treatment to timber that violates national laws and timber that does not. Moreover, if 'legally' and 'illegally' harvested timber are to be considered like products, this difference in treatment raises issues under Article I of the General Agreement on Tariffs and Trade 1994 (GATT), which contains the obligation to grant Most-Favoured-Nation (MFN) treatment. The author also argues that Article XX(d) GATT, which contains an exception to GATT obligations for measures necessary to secure compliance with laws or regulations not inconsistent with GATT, is not applicable because the Appellate Body (AB) interpreted that provision's scope in such a way that the Lacey Act does not fall within it.³⁵ The AB noted that the term 'laws or regulations' with which the measure of the WTO Member invoking the exception seeks to secure compliance, only refers to domestic laws while the Lacey Act seeks to enforce international obligations.³⁶ However, such an approach fails to take into account that the Lacey Act could also aim to ensure compliance with other domestic laws. We will address this issue with regard to the Timber Regulation *infra*.

C. AUSTRALIA: ILLEGAL LOGGING PROHIBITION BILL

In 2012, Australia introduced the Illegal Logging Prohibition Bill (Bill), which—in contrast to the Timber Regulation—prohibits the *importation* into Australia, as well as the domestic processing, of illegally logged timber and timber products. Furthermore, it obliges importers of timber and processors of raw logs to conduct due diligence.³⁷ Illegally logged timber is defined as timber harvested in violation of the laws of the country of harvest; in the case of the processing of raw logs this means Australia, since imported raw logs are exempted from the rules on processing of illegally logged raw logs.³⁸ The list of timber products that are to fall within the scope of the Bill is to be established in supplementary legislation. Compliance with the Bill is to be ensured

³² Environmental Investigation Agency and World Resources Institute, 'Are You Ready for the Lacey Act?' (Fact Sheet, Environmental Investigation Agency and World Resources Institute 2009) figure 1.

³³ Lacey Act, para 3375 (a) juncto para 3371 (h).

³⁴ D Brack, 'Combating Illegal Logging: Interaction with WTO Rules' (2009) Chatham House Briefing Paper, 9; S Bernstein and E Hannah, 'The WTO and Institutional (In)Coherence in Global Economic Governance' in A Narlikar, M Daunton and R Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press 2012) 801.

³⁵ F G Tanczos, 'A New Crime: Possession of Wood – Remediating the Due Care Double Standard of the Revised Lacey Act', (2011) 42 Rutgers Law Journal 549, 579-584.

³⁶ Appellate Body Report, Mexico — Soft Drinks, WT/DS308/AB/R, para 69.

³⁷ Illegal Logging Prohibition Bill, ss 6, 8-9, 12-15 and 17-18.

³⁸ *ibid*, s 7.

through monitoring and investigations by government designated inspectors.³⁹ The Bill puts the following penalties: i) five years imprisonment or 500 penalty units,⁴⁰ or both, on the importation of illegally logged timber or timber products and the processing of illegally logged raw logs; ii) 300 penalty units for violating the due diligence requirements related to importing illegally logged timber or timber products or processing raw logs; and iii) 100 penalty units for not making a customs declaration.

The consistency of the Bill with Australia's WTO obligations has been the subject of some academic research. Brack, Chandra, and Kinasih argue that legally and illegally harvested timber are not like products because the decisive issue is not content of the various national laws, but rather compliance or non-compliance with whatever national laws exist. Consequently, in their view the Bill does not violate Articles I or III GATT. However, the Bill might violate Article XI GATT as it limits timber imports in the sense of that provision. These authors consider Article XX(g) GATT, which provides an exception to WTO obligations for measures relating to the conservation of exhaustible natural resources, the strongest defense for the Bill.⁴¹ Mitchell and Ayres conclude that the Bill discriminates between like products as the definition of illegally logged depends on varying domestic standards in the country of harvest, thereby likely violating Article I GATT. Moreover, the Bill is likely to be inconsistent with Article XI GATT.⁴²

According to Mitchell and Ayres, the Bill can probably not be justified by the exceptions contained in Article XX GATT. Moreover, it is noted that if the Bill were to fall within the scope of the Agreement on Technical Barriers to Trade (TBT Agreement), it is likely to be inconsistent with Articles 2.1 and 2.2 thereof.⁴³ Stephens and Saul contest that, under the definitions of the Bill, legally and illegally harvested timber are like products. In addition, they argue that, as the Bill refers the legality test back to national laws, it respects the conditions of production and competition, and thus alleviates issues concerning unilateral trade restrictive measures. Nonetheless, compliance with Article XI:1 GATT is identified as a potential issue by these authors as well. Stephens and Saul argue that, although this remains speculative, the Bill might withstand the test of Article XX(g) and possibly (b) GATT. However, they observe that timber is 'illegal' if it is harvested in violation of any law, including, for example, labor standards or human rights. Although this issue may still be remedied by an implementing decision, it may, for now, violate the condition of being made effective in conjunction with domestic restrictions of Article XX(g) GATT.⁴⁴

³⁹ *ibid*, ss 19-58.

⁴⁰ Crimes Act 1914, s 4AA. At the time of writing, a penalty unit is 170AU\$ or 135€ or 180US\$. The amount is indexed yearly.

⁴¹ D Brack, A Chandra and H Kinasih, 'The Australian Government's Illegal Logging Prohibition Bill: WTO implications' (Report, International Institute for Sustainable Development Trade Knowledge Network 2012).

⁴² A Mitchell and G Ayres, 'Out of Crooked Timber: The Consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement' (2012) 29 Environmental and Planning Law Journal 462, 467-471.

⁴³ A Mitchell and G Ayres, 'Out of Crooked Timber: The Consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement' (2012) 29 Environmental and Planning Law Journal 462, 475-477. The authors, however, note that, for now, the Bill does not lay down technical regulations; it does not fall under the scope of the TBT Agreement.

⁴⁴ T Stephens and B Saul, 'Not Yet Out of the Woods: Australia's Attempt to Regulate Illegal Timber Imports and World Trade Organisation Obligations' (2012) 19 Australian International Law Journal 143.

III. THE WTO-CONSISTENCY OF EU REGULATION 995/2010

As demonstrated in the previous section, the EU, the U.S., and Australia seemingly adopt a similar approach in denying illegally logged timber access to their respective markets. Having assessed the three main national legislative schemes to address the problem of illegal logging, we now turn to the question of WTO-consistency of the EU's Timber Regulation.

A. TRADE EFFECTS OF THE TIMBER REGULATION: CONCERNS RAISED IN THE WTO

The question of WTO-consistency of the Timber Regulation does not come from nowhere. At the latest Trade Policy Review of the European Union, which took place in 2011, a number of WTO Members expressed their concern regarding the Regulation. The representative for Canada noted:

‘labelling or traceability requirements beyond what is necessary for consumer information can place a disproportionate burden on imports given the complexities of manufacturing processes and global value-chains. For example the EU's Illegal Timber Regulation has traceability requirements that could provide an unfair competitive advantage to manufacturers of forest products in the EU compared to their international competitors.’⁴⁵

Indonesia also expressed its concern with respect to the due diligence system established by the Regulation.⁴⁶ El Salvador asked why the European Union did not notify the TBT Committee of the proposed Regulation. In response, the EU stated that ‘the proposal for Regulation (EU) 995/2010 did not contain any technical regulations and that is why no notification under the Agreement on Technical Barriers to Trade has been made.’⁴⁷ The Trade Policy Review Report prepared by the WTO Secretariat places the Timber Regulation under the heading of ‘measures directly affecting imports’ and ‘restrictions and controls’.⁴⁸ It further stipulates [in relevant part]:

‘Quantitative restrictions and controls on imports are in place to implement sanctions imposed by United Nations resolutions, and provisions under international treaties or conventions. In addition, the EU maintains unilateral import controls to attain non-economic objectives.’⁴⁹

In general, it can be concluded that timber-exporting countries have expressed concern with respect to the potential trade-restrictive effects of legislation aiming to address illegal logging. As noted by Mitchell and Ayres, so far only Argentina has questioned the motives behind these types of legislation.⁵⁰ They refer to a meeting of

With regard to Article XX(g) GATT, the authors raise an interesting point regarding the definition of ‘illegal’, which is addressed further.

⁴⁵ WTO, Trade Policy Review Body, Trade Policy Review of the European Union, Minutes of the Meeting on the 6th and 8th of July 2011, 14 September 2011, WT/TPR/M/248, para 135.

⁴⁶ WTO, Trade Policy Review Body, Trade Policy Review of the European Union, Minutes of the Meeting on the 6th and 8th of July 2011, 31 August 2011, WT/TPR/M/248/Add.1, 364.

⁴⁷ *ibid*, 396.

⁴⁸ WTO, Trade Policy Review Body, Trade Policy Review of the European Union, Report by the Secretariat, WT/TPR/S/248/Rev.1, 43. Notably, the Regulation is not listed under ‘Technical regulations and standards.’

⁴⁹ *ibid*, 44.

⁵⁰ A Mitchell and G Ayres, ‘Out of Crooked Timber: The Consistency of Australia’s Illegal Logging Prohibition Bill with the WTO Agreement’ (2012) 29 Environmental and Planning Law Journal 462, 465.

the TBT Committee where the representative for Argentina stated, in response to a notification by the U.S. concerning the Lacey Act, that:

‘the regulation [the implementation of Revised Lacey Act Provisions] was not necessarily intended to protect endangered species but rather to protect domestic markets from imports.’⁵¹

One of the functions of the WTO is the settlement of trade disputes between its Members.⁵² A Member may bring a complaint against a fellow Member if it considers that benefits accruing to it under the covered agreements are being impaired by the actions of that other Member.⁵³ Although the reaction of the countries affected by the Timber Regulation seems to have been muted so far, it is still warranted to assess whether the Regulation would withstand WTO scrutiny. In the following paragraphs, it will be established that the Timber Regulation may become subject of WTO Dispute Settlement Proceedings. Additionally, an analysis will be provided of the consistency of that Regulation with the EU’s obligations as a WTO Member.

However, it is appropriate to point out that the likelihood of a WTO challenge may be rather limited. As stated, a key feature of the EUTR is that the assessment of legality is made on the basis of the domestic laws of the country of harvest. Hence, it is unlikely for a country that has legislation in place making certain timber illegal to file a WTO complaint alleging a breach of another Member’s WTO obligations for restricting the importation of the very same illegally logged timber. The theoretical question underlying this problem is whether the rules of the WTO do apply to illicit trade in the same way as they apply to trade in legal products. Ultimately, it is more likely that a WTO Member would challenge the EU Timber Regulation in so far as its due diligence requirements lead to a disparate impact upon the export of legally harvested timber of the Member in question. However, it would be very hard to assess such a claim *in abstracto*. Nonetheless, considering the economic importance of the EU marketplace for foreign producers, more measures that restrict market access such as the EUTR are likely to be used as governance tools. Hence, the questions that arise in the following substantive analysis remain poignant. Moreover, the EUTR may serve as a WTO compliant example of how to govern through trade, regardless of crucial questions of effectiveness and extraterritoriality.

⁵¹ WTO, Committee on Technical Barriers to Trade, Minutes of the Meeting of 5-6 November 2008, 29 January 2009, G/TBT/M/46, para 36. See also Andrew Mitchell and Glyn Ayres, ‘Out of Crooked Timber: The Consistency of Australia’s Illegal Logging Prohibition Bill with the WTO Agreement’, (2012) 29 Environmental and Planning Law Journal 462, 465.

⁵² To that end, it shall ‘administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the “Dispute Settlement Understanding” or “DSU”) in Annex 2 to [the WTO Agreement].’ Article 3.3 of the Marrakesh Agreement Establishing the World Trade Organization.

⁵³ Therefore, any timber-exporting Member that considers that its trading opportunities are adversely affected by the Timber Regulation may file a request for consultations with the EU under Article 4.4 of the DSU. The request for consultations must be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint. Should these consultations not lead to a ‘mutually agreed solution’ the complaining Member may file a request for the establishment of a Panel, which shall then decide on the issue. Should the Panel uphold the complaint of WTO-inconsistency, the EU would be obliged to withdraw the measure. Art. 3.7 DSU stipulates [in relevant part]: In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

B. SUBSTANTIVE ANALYSIS

The principles of market access and non-discrimination are the cornerstones of the multilateral trading system. WTO Members may not discriminate between products originating in the territories of different Members. This MFN treatment obligation is contained in Article I:1 GATT. Next to this MFN treatment obligation, WTO Members may not treat domestic products ‘more favorably’ than ‘like’ imported products. This ‘National Treatment’ obligation is laid down in Article III GATT. Furthermore, WTO Members have committed themselves to the obligation not to impose prohibitions or restrictions other than duties, taxes, or other charges, by virtue of Article XI GATT. These three obligations are relevant in assessing the GATT-consistency of the Timber Regulation. In addition to these obligations, however, Article XX GATT contains a number of exceptions that may, under certain conditions, ‘remedy’ an otherwise GATT-inconsistent measure.⁵⁴

1. *General Agreement on Tariffs and Trade 1994*

(a) Article XI GATT

Article XI GATT stipulates in paragraph 1:

‘no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.’

As such, this article prohibits quantitative restrictions on imports. The scope of this article is very broad, as was defined by Panels.⁵⁵ The Panel in *Dominican Republic – Cigarettes* held that ‘measures which affect the opportunities for importation itself’ would be covered by the terms ‘prohibitions or restrictions.’⁵⁶ In *Brazil – Retreaded Tyres* the Panel clarified the term ‘prohibitions’; it held that the term was unambiguous and that it means that ‘Members shall not forbid the importation of any product of any other Member into their markets.’⁵⁷ Article XI covers both *de jure* as well as *de facto* prohibitions or restrictions, as was held by the Panel in *Argentina – Hides and Leather*.⁵⁸

As noted above, the Timber Regulation prohibits ‘operators’ from placing ‘illegally harvested timber’ on the market. The enforcement of this prohibition is ensured by Article 19 of the Regulation, which requires EU Member States to set up a system of effective penalties applicable to infringements of the Regulation. In this respect, it is again appropriate to refer to the Panel in *Brazil – Retreaded Tyres*. It held that:

⁵⁴ GATT Panel Report, United States Section 337 of the Tariff Act of 1930, L/6439, 36S/345, para 5.9.

⁵⁵ Panel Report, India — Quantitative Restrictions, WT/DS90/R, para 5.129; GATT Panel Report on Japan — Semi-Conductors, L/6309, 35S/116, para 104.

⁵⁶ Panel Report, Dominican Republic — Import and Sale of Cigarettes, WT/DS302/R para. 7.261; finding not appealed.

⁵⁷ Panel Report, Brazil — Retreaded Tyres, WT/DS332/R, para 7.11.

⁵⁸ Panel Report, Argentina — Hides and Leather, WT/DS155/R, paras 11.20–11.21.

'In the present case, we note that the fines as a whole, including that on marketing, have the effect of penalizing the act of "importing" retreaded tyres by subjecting retreaded tyres already imported and existing in the Brazilian internal market to the prohibitively expensive rate of fines. To that extent, we consider that the fact that the fines are not administered at the border does not alter their nature as a restriction on importation within the meaning of Article XI:1. In addition, the level of the fines – R\$ 400 per unit, which significantly exceeds the average prices of domestically produced retreaded tyres for passenger cars (R\$ 100-280) – is significant enough to have a restrictive effect on importation.'⁵⁹

The similarities to the Timber Regulation are striking. Although the Regulation does not implement a *de jure* prohibition on imports such as a ban on illegally logged timber, it certainly results in a *de facto* prohibition. Importers, or 'operators', will become very cautious in importing timber, regardless of whether it has been harvested legally or illegally, since a failure to live up to the due diligence standards might result in criminal liability. It might be argued that this is a private decision, taken by each individual operator. However, the AB has stated in *Korea – Beef* that 'the intervention of some element of private choice' does not relieve a WTO Member of responsibility for the restrictive effects of a measure.⁶⁰ Charnovitz has noted that the 'illegality of importation under the law of the importing country is not a justification under WTO rules to block the importation.'⁶¹ Consequently, the measure, in as far as it criminalizes the act of importation of illegally harvested timber, appears to be inconsistent with Article XI GATT since it constitutes a restriction on importation.

(b) Article III GATT

Even if the set of measures laid down by the Timber Regulation were not to be considered a quantitative restriction in the sense of Article XI GATT, they could potentially still qualify as an internal measure in the sense of Article III GATT. This provision contains the National Treatment obligation, which essentially requires WTO Members not to treat foreign products less favorably than like domestic products. Article III:4 GATT states [in relevant part]:

'The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of *all laws, regulations and requirements* affecting their *internal* sale, offering for sale, purchase, transportation, distribution or use.' [emphasis added].

The question is therefore whether the Timber Regulation accords the 'illegally harvested timber' less favorable treatment than it does 'like' domestic timber. This requires an answer to the question as to whether 'illegally harvested' timber is 'like' legally harvested domestic timber. However, first it must be established first whether the Timber Regulation is an internal measure or a border measure.

⁵⁹ Panel Report, Brazil — Retreaded Tyres, WT/DS332/R, paras 7.372–7.373.

⁶⁰ Appellate Body Report, Korea — Beef, WT/DS161/AB/R, WT/DS169/AB/R, para 146.

⁶¹ S Charnovitz, 'The World Trade Organization and Law Enforcement' (2003) 37 Journal of World Trade 817, 830.

(i) Is the Timber Regulation an internal measure: Article XI vs Article III:4?

Article III GATT only applies to internal measures. From the ad note to the article it can be derived that Article III GATT would apply to border measures if the product in question fails to meet a requirement that is also applied to like domestic products.⁶² Howse sees Article III:4 and Article XI GATT as mutually exclusive. In his view, 'the architecture of the GATT would make little sense if internal laws, regulations and requirements could also be viewed as restrictions and prohibitions on imports or exports. If that were so, then internal laws, regulations, and requirements would be *prima facie* violations of the GATT, even if they were nondiscriminatory.'⁶³ However, as van den Bossche notes, it is possible that one measure is both an internal measure *and* a border measure.⁶⁴ Contrary to the Australian Illegal Logging Prohibition Bill, the Timber Regulation does not explicitly prohibit the importation of illegally harvested timber; rather, it prohibits the 'placing on the market' of such timber, thereby implying that timber that originates in the EU and was harvested illegally may also not be placed onto the market. In light of the foregoing we will assess whether the Regulation withstands the two-tier test of consistency with Article III GATT.

(ii) Likeness

In *EC – Asbestos* the AB held that

'a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.'⁶⁵

In determining whether products can indeed be considered 'like', one has to assess four criteria: (i) physical characteristics, (ii) end use, (iii) consumer tastes and habits, and (iv) tariff classification. The physical characteristics, end uses, and tariff classification of legally harvested and illegally harvested timber are essentially the same. Consumer tastes and habits are the only criterion on which an argument of 'unlikeness' could reasonably be made. One might argue that consumers have a preference for legally logged timber and that they prefer to buy products that do not contain illegally harvested timber. If this preference for legally logged timber is strong

⁶² Note Ad Article III: 'Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and *is collected or enforced in the case of the imported product at the time or point of importation*, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.' [emphasis added].

⁶³ R Howse and J Langille, 'Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 *Yale Journal of International Law* 367, 405.

⁶⁴ P van den Bossche, *The Law and Policy of the World Trade Organization* (2nd ed, Cambridge University Press 2008), 347. Van den Bossche refers to the Panel Report in *India – Autos*, in which it was held that: '...it therefore cannot be excluded a priori that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected), or even that there may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions, as was suggested in the case of state trading.' Panel Report, *India – Autos*, WT/DS146/R and WT/DS175/R, para. 7.224.

⁶⁵ Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, paras 98-99.

enough, this might detract substantially from the competitive relationship between the two groups of products thereby making them unlike. As noted by Bartels, this requires a case-by-case analysis in which, by means of quantitative methods, one would have to ascertain what the identifiable groups of consumers (commercial or natural persons) are. In his view, it is likely that based on this analysis, the products will be considered unlike.⁶⁶ Two points can be raised against this conclusion, however. First, in the case of the Timber Regulation, illegality is determined by the legislation of the country of harvest. Consumers will often not be aware of the conditions laid down by this particular legislation. Secondly, as noted by Mitchell and Ayres, if the (il)legality of the timber or timber products is the only difference between two otherwise identical products, the consumer preference for legally harvested timber would not be sufficiently strong to detract substantially from the competitive relationship between the two groups of products.⁶⁷ Mitchell and Ayres therefore conclude that illegally and legally harvested timber are like products. Brack, Chandra, and Kinasih oppose this conclusion as they argue that the likeness should be determined based on compliance with whatever national legislation exists, regardless of its content. This is exactly what the Timber Regulation does. Their point of view seems to be that when national legislation of another country determines that a certain product is illegal, the competitive relationship between that product and a similar legal product ceases to exist.⁶⁸

With respect to the Australian Illegal Logging Prohibition Bill, Mitchell and Ayres conclude that:

‘The end uses of those products would be the same, and even their processes and production methods could be identical because the definition of “illegally logged” in the Bill focuses solely on the laws of the country of origin, not on the method of harvesting. It may be that Australian consumers might prefer to purchase products that do not contain illegal timber. However, it seems likely that if the products were identical in every other way, including in their impact on the environment, this preference would not be strong enough to substantially detract from the competitive relationship between them.’⁶⁹

Brack, Chandra and Kinasih respond by stating:

‘Taking this argument—that discrimination on the basis of legality is inconsistent with WTO rules—to its logical conclusion, it would appear that national laws cannot be used at all as a basis to restrict trade in illegal timber—or indeed, in anything else. For any legislation affecting anything that could be traded, every country should have the same laws. [...] It seems unlikely that the drafters of the GATT and the other WTO agreements had this conclusion in mind when they negotiated their final texts. It is not the *content* of the laws that should be the issue for a WTO dispute, but *compliance or non-*

⁶⁶ L Bartels, ‘WTO Law aspects of The Clean Trade Project’, < <http://www.wenar.info/CleanTrade.html>> accessed 17 May 2013>.

⁶⁷ A Mitchell and G Ayres, ‘Out of Crooked Timber: The Consistency of Australia’s Illegal Logging Prohibition Bill with the WTO Agreement’ (2012) 29 Environmental and Planning Law Journal 462, 468.

⁶⁸ D Brack, A Chandra and H Kinasih, ‘The Australian Government’s Illegal Logging Prohibition Bill: WTO implications’ (Report, International Institute for Sustainable Development Trade Knowledge Network 2012), 9.

⁶⁹ A Mitchell and G Ayres, ‘Out of Crooked Timber: The Consistency of Australia’s Illegal Logging Prohibition Bill with the WTO Agreement’ (2012) 29 Environmental and Planning Law Journal 462, 468.

compliance with whatever national laws exist. Following this argument, legal and illegal timber are not like products.⁷⁰

It appears that in their view, products that are illegal in a certain country can never be in a competitive relationship with, and hence 'like', similar products originating in a country where they are legal because trade in those illegal products would be impossible since these products are unauthorized.

In that case, absent like products there is no issue of non-discrimination under Article III:4. However, for the sake of argument, assuming that illegal and legal timber are indeed like products, we now turn to the question of whether the Timber Regulation accords less favorable treatment to like imported products.

(iii) Less Favorable Treatment

Article III:4 GATT applies to both *de jure* and *de facto* violations. The Timber Regulation does not explicitly differentiate between domestic and imported timber. The obligations it lays down for operators and traders apply irrespective of whether the timber is produced within the EU or in a third country. Consequently, any claim of inconsistency with respect to Article III:4 GATT would amount to an allegation of *de facto* discrimination.

In *Korea – Beef* the AB stated that:

'A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.'⁷¹ [emphasis in the original].

In *Dominican Republic – Cigarettes* the AB elaborated upon the term 'to the detriment of imported products' by clarifying that 'the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained *by factors or circumstances unrelated to the foreign origin of the product ...*'.⁷² Based on this, Bartels suggests that it is necessary to assess whether there are 'factors or circumstances' that explain the discriminatory effect of the measure. Subsequently, one would have to establish whether these factors and circumstances are related to the origin of the products.⁷³ In *US – Clove Cigarettes* the AB held that:

'the "treatment no less favourable" standard of Article III:4 GATT 1994 prohibits WTO Members from modifying the conditions of competition in the

⁷⁰ D Brack, A Chandra and H Kinasih, 'The Australian Government's Illegal Logging Prohibition Bill: WTO implications' (Report, International Institute for Sustainable Development Trade Knowledge Network 2012), 9.

⁷¹ Appellate Body Report, *Korea – Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras 135–137.

⁷² Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, WT/DS302/AB/R, 25 April 2005, para 96.

⁷³ L Bartels, 'WTO Law aspects of The Clean Trade Project', < <http://www.wenar.info/CleanTrade.html> > accessed 17 May 2013>, 6.

marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products.⁷⁴

Flett argues, based on paragraph 100 of the same AB Report, that Art. III:4 GATT must be interpreted analogously to Article 2.1 TBT Agreement as they are both built around the same core terms.⁷⁵ Consequently, in his view, ‘regulatory distinctions that stem *exclusively* from the pursuit of legitimate objectives remain permissible.’⁷⁶ Therefore, if the regulatory distinction between illegally and legally harvested timber stems exclusively from the pursuit of legitimate objectives, the difference in treatment by means of the prohibition on placing illegally harvested timber on the market would not constitute less favorable treatment in the sense of Article III:4 GATT. The objectives of the Regulation can be found in the preamble and they range from maintaining biodiversity, combatting deforestation, and protecting the climate system.⁷⁷ Since the Regulation is applied in an ‘even-handed’ manner, there does not appear to be a detrimental impact on imported timber.

Consequently, even assuming that illegally logged timber is like legally logged timber, it will be difficult to answer the question whether less favorable treatment has been accorded to illegal timber in the affirmative. Therefore, to the extent that the Timber Regulation can be considered an internal measure falling under Article III:4 GATT, it is likely to be consistent with the substantive requirements of that article.

(c) Article I GATT

The MFN treatment obligation enshrined in Article I:1 GATT essentially requires WTO Members not to discriminate between foreign ‘like’ products on the basis of their origin. It provides [in relevant part] that:

‘with respect to *all rules and formalities* in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, *any advantage, favour, privilege or immunity* granted by any contracting party to any product originating in or destined for any other country shall be accorded *immediately and unconditionally* to the *like product* originating in or destined for the territories of all other contracting parties.’⁷⁸

The Timber Regulation sets out a set of rules that operators have to comply with in order to legally place timber or timber products on the internal market for the first time. It therefore establishes rules and formalities in connection with importation; hence, Article I:1 GATT is applicable. The next question is whether the Timber Regulation confers an advantage. In *EC – Bananas*, the AB held that an advantage exists where a measure creates ‘more favourable import opportunities’ for certain products

⁷⁴ Appellate Body Report, US — Clove Cigarettes, WT/DS406/AB/R, para 179.

⁷⁵ *ibid.*, para 100. See also J Flett, ‘WTO Space for National Regulation: Requiem for a Diagonal Vector Test’ (2013) 16 Journal of International Economic Law 37, 61.

⁷⁶ J Flett*, ‘WTO Space for National Regulation: Requiem for a Diagonal Vector Test’ (2013) 16 Journal of International Economic Law 37, 62. Emphasis in the original. It must be noted that this statement is made based on the wording of Article 2.1 TBT Agreement. The words ‘legitimate objectives’ can only be found in that article, and not in Article III:4 GATT. Nevertheless, because Article III:4 GATT and 2.1 of the TBT Agreement need to be interpreted and applied in a consistent and coherent manner, it is warranted to transpose the reasoning to Article III:4 GATT. *The author is a member of the WTO team of the Legal Service of the European Commission.

⁷⁷ Timber Regulation, recital 1 and 3.

⁷⁸ Art. I:1 GATT, emphasis added.

depending on their origin. The concept of ‘advantage’ must be interpreted broadly. This reading was confirmed in *Canada – Autos*, where the AB held that advantages might result from either positive or negative treatment for the product at issue.⁷⁹ In the case at hand, timber that has been legally harvested may be marketed in the EU, whereas timber that has been harvested illegally may not be placed onto the internal market. Consequently, the Timber Regulation does confer an advantage to certain products.

(i) Likeness

Secondly, it has to be established whether illegally logged timber and timber products are ‘like’ legally logged timber and timber products. Only a handful of Panel Reports deal with the concept of ‘like products’ under Article I:1 GATT. The term ‘like products’ is used on more than one occasion in the GATT, and although the AB held in *Japan – Alcoholic Beverages II* that the meaning of the concept varies according to its context, elements from the likeness test carried out under Article III:4 GATT can still be used.⁸⁰ Assuming that, based on the four-criterion test as set out by the AB in *EC – Asbestos*, illegally logged timber is like legally logged timber, there would be a violation of Article I:1 GATT because the advantage accorded to legally logged timber is not accorded immediately and unconditionally to like products from other WTO Members.

(d) Article XX GATT

As is clear from the first recital of the Marrakesh Agreement, which establishes the WTO, enhancing trade is not the organization’s sole objective.⁸¹ In certain situations, measures pursuing certain policy objectives other than liberalizing trade must be balanced with WTO obligations. For this reason, the agreement includes exceptions to justify measures that violate WTO obligations. In this respect, the most important provision is Article XX GATT, which contains the general exceptions. However, in order to benefit from these exceptions, two conditions must be fulfilled: the WTO Member maintaining the measure must establish first that the measure comes within the scope of one of the policy exceptions listed in Article XX GATT and second that the measure is also consistent with the *chapeau* of this provision.

⁷⁹ Appellate Body Report, *Canada — Autos*, WT/DS139/AB/R, WT/DS142/AB/R para 79.

⁸⁰ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS/8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 19-20.

⁸¹ The first recital reads:

Recognizing that their relations in the field of trade and economic endeavour should be conducted
with a view to raising standards of living, ensuring full employment and a large and steadily growing
volume of real income and effective demand, and expanding the production of and trade in
goods and
services, while allowing for the optimal use of the world’s resources in accordance with the
objective
of sustainable development, seeking both to protect and preserve the environment and to
enhance the
means for doing so in a manner consistent with their respective needs and concerns at different
levels
of economic development,
...

With regard to the first step of justifying a measure inconsistent with GATT obligations, three policy exceptions may be applicable to the Timber Regulation at first glance: measures aiming to protect human, animal, or plant life or health; measures necessary to secure compliance with laws or regulations which are not inconsistent with the GATT; and measures relating to the conservation of exhaustible natural resources. After addressing these policy exceptions, we address the compatibility of the Timber Regulation with the chapeau of Article XX GATT.

(i) Article XX(b): Human, animal or plant life

Measures which are necessary to protect human, animal, or plant life or health may be justified under Article XX(b) GATT. Therefore, it must first be established that the measure is covered by the policy exception. In *US – Gasoline*, the Panel accepted that the contested measure was covered by Article XX(b) GATT since it concerned animal and plant health; this was based on the link between the measure at hand, which aimed to reduce air pollution, and the effect of air pollution on human, animal, and plant health.⁸² However, in two other cases, Panels held that the measure was not covered by the policy exception because the text, design, architecture, and structure of the measure were not for the purpose of the protection of health.⁸³ Although these findings indicate that the coverage of this exception does not extend to the mere side effects of a measure, the measures under scrutiny in the two latter cases can be distinguished from the Timber Regulation, which aims to protect animal and plant life by protecting biodiversity, ecosystem functions, and the climate system.⁸⁴ The link between illegal logging and these aims appears clear, but it would nonetheless be the subject of a factual analysis by a Panel.

Successively, it must be established that the measure is necessary to achieve the policy objective. It is important to highlight that the necessity test does not include an assessment of the appropriateness of the end sought by the measure.⁸⁵ ‘Necessary’ is not to read as ‘indispensable’, although its meaning in the context of Article XX GATT is closer to ‘being indispensable’ than it is to ‘making a contribution to’.⁸⁶ The interpretation of the necessity condition arguably encompasses three factors: (i) the relative importance of the common interests or values that are intended to be protected by the challenged measure, (ii) the contribution of the measure to the objective pursued by the measure, and (iii) whether an alternative measure which is less trade restrictive than the measure under scrutiny is reasonably available.⁸⁷ When considering the second factor, it must be assessed whether the measure is apt to make a material contribution to the policy objective pursued. This means assessing whether there is a ‘genuine relationship of ends and means between the objective pursued and the measure at issue’, which is neither merely marginal nor insufficient.

⁸² Panel Report, *US – Gasoline*, WT/DS2/R, para 6.21.

⁸³ Panel Report, *EC – Tariff Preferences*, WT/DS246/R, paras 7.200-7.210; Panel Report, *China – Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, paras 7.498-7.516.

⁸⁴ Timber Regulation, recital 1.

⁸⁵ Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, para 172. It is up to the Member to decide on the level of protection sought by the measure.

⁸⁶ Appellate Body Report, *Korea – Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para 161.

⁸⁷ *ibid*, paras 161-164; GATT Panel Report, United States Section 337 of the Tariff Act of 1930, L/6439, 36S/345, para 5.26.

Therefore, a Panel must make quantitative projections or have qualitative reasoning based on evidence.⁸⁸ Regarding the third factor, it must be noted that it is up to the complainant to identify alternative measures.⁸⁹ However, if the Panel finds these alternatives to be genuine alternatives and not complementary measures, the respondent must demonstrate that the alternative is not readily available, i.e. that it imposes an unduly burden on the respondent or is merely theoretical.⁹⁰

In the case of the Timber Regulation, it should be said that the importance of the common interest or values protected by it are not considered to be of equal importance to human life. Nonetheless, the interpretation of the term 'exhaustible natural resources', which we address *infra*, shows that the AB is not insensitive to the importance of flora. It remains a question as to the extent this factor plays a role in the weighing and balancing exercise that is the application of the necessity test. The second factor, at first, does not appear to be very problematic. The Timber Regulation's prohibition to place illegally harvested timber on the internal market clearly makes a material contribution to the policy goal of protecting plant (and animal, and perhaps also human) life as there is a genuine relationship, which is neither marginal nor incidental, between the Timber Regulation and the relevant policy goal. As concerns the third factor, it is not unthinkable that a complainant would come up with a less trade restrictive alternative measure. An example of such an alternative, as proposed by Canada and Norway in the context of the *EC – Seal Products* case,⁹¹ could be a licensing or certification system. However, it is not easy for the complainant to establish that such a system would attain the same level of protection as contained in the Timber Regulation and would be reasonably available.⁹² Nonetheless, it must be stressed that a Panel's analysis of the facts of the case, including information submitted by the complainant, may lead to different views regarding the necessity of the Timber Regulation.

(ii) Article XX(d): Compliance measures

In case a measure is necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of the GATT, Article XX(d) may justify a violation of a Member's WTO obligations. To benefit from this exception, a measure must come within the scope of this provision. In *Mexico – Soft Drinks*, the AB decided that the measure must therefore be designed to enforce compliance of domestic laws or regulations, even if there is no certainty that it will.⁹³ Hence, it is sufficient that the design of a measure contributes to securing compliance.⁹⁴ The preamble to the Timber Regulation appears to foresee this option, as it refers to illegal logging as a threat to 'the commercial viability of operators acting in accordance with applicable legislation'.⁹⁵ This indicates that the Timber Regulation aims to ensure compliance

⁸⁸ Appellate Body Report, Brazil – Retreaded Tyres, WT/DS332/AB/R, paras 151 and 210; Appellate Body Report, China – Publications and Audiovisual Products, WT/DS363/AB/R, paras 253 and 290-297.

⁸⁹ Appellate Body Report, Brazil – Retreaded Tyres, WT/DS332/AB/R, para 156.

⁹⁰ Appellate Body Report, US – Gambling, WT/DS285/AB/R, para 308; Appellate Body Report, China – Publications and Audiovisual Products, WT/DS363/AB/R, paras 312-331.

⁹¹ EC – Seal Products, WT/DS400 and WT/DS401.

⁹² Panel Report, US – Clove Cigarettes, WT/DS406/R, para.7.423.

⁹³ Appellate Body Report, Mexico – Soft Drinks, WT/DS308/AB/R, para 74.

⁹⁴ *ibid.*

⁹⁵ Timber Regulation, recital 3.

either with legislation that, for example, prevents deceptive practices⁹⁶ or, more broadly, with EU competition or consumer protection laws.⁹⁷ Moreover, the Panel stated that ‘there should be a degree of certainty in the results that may be achieved through the measure’ for it to be covered by this exception.⁹⁸ Considering its substantive obligations, the Timber Regulation appears to hold a reasonable chance of success of doing so.

As addressed under Article XX(b) GATT, the measure must be necessary to be justified under this policy exception. The legal analysis of this requirement here is almost identical to the one under Article XX(b) GATT.⁹⁹ However, when applying the necessity test regarding this policy exception to the Timber Regulation, problems appear to arise. It can be seriously questioned whether no alternative measure which is less trade restrictive than the measure under scrutiny is reasonably available to secure compliance with the mentioned laws or regulations. Considering that the nature of Article XX GATT is to provide a balance between trade liberalization and other societal values and interests,¹⁰⁰ it would seem that justifying the Timber Regulation under this policy exception would disrupt this balance.

(iii) Article XX(g): Conservation of exhaustible natural resources

Article XX(g) GATT provides a justification for measures ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’. This provision has been previously found to encompass, for example, things such as clean air and sea turtles, and has hence been interpreted broadly.¹⁰¹ Therefore, it is safe to assume that forests would fall within the scope of Article XX(g) GATT. To justify a measure under this provision, two more conditions should be fulfilled.

First, it must be remarked that this policy exception requires the measure at hand to ‘relate to’ the policy objective, rather than ‘be necessary’. For a measure to relate to a policy objective, the relationship between on the one hand, the general structure and design of the measure, and on the other hand, an examination of the policy goal.¹⁰² According to the AB, the measure should not be ‘disproportionately wide in its scope and reach in relation to the policy objective’, and the ‘means’ should be ‘reasonably related to the ends’.¹⁰³ Moreover, in *US — Shrimp*, the AB held that the measure was ‘not a simple, blanket prohibition on the importation of shrimp imposed without regard

⁹⁶ This is one of the examples listed in Article XX(d) GATT.

⁹⁷ For example the Unfair Commercial Practices Directive, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.

⁹⁸ Panel Report, Mexico — Soft Drinks, WT/DS308/R, para 8.188.

⁹⁹ P Mavroidis, *Trade in Goods* (2nd ed, Oxford University Press 2012), 342-344.; P Van den Bossche, *The Law and Policy of the World Trade Organization* (2nd ed, Cambridge University Press 2008), 634.

¹⁰⁰ P Van den Bossche, *The Law and Policy of the World Trade Organization* (2nd ed, Cambridge University Press 2008), 618.

¹⁰¹ Panel Report, *US — Gasoline*, WT/DS2/R, para 6.37; Appellate Body Report, *US — Shrimp*, WT/DS58/AB/R, para 131. In the foregoing paragraphs, the AB explicitly and elaborately sets out that not only non-living resources, such as petroleum or minerals, are covered, but also living resources.

¹⁰² *ibid*, para 137.

¹⁰³ *ibid*, para 141. Hence, the AB departed from earlier practice in which it was required that the measure was ‘primarily aimed at’ conserving exhaustible natural resources.

to the consequences (or lack thereof) of the mode of harvesting employed'.¹⁰⁴ When applying this condition to the Timber Regulation, it should be restated that the preamble clearly indicates that illegal logging contributes to deforestation and forest degradation and undermines sustainable forest management and development.¹⁰⁵ It appears that the structure of the measure is aimed primarily at the protection of forests without being disproportionately wide. There is no blanket ban on wood imports and it seems that banning illegally logged timber is reasonably related to the means. As the Timber Regulation does not impose a definition of legality but rather points back at domestic laws related to timber, and not just any law, it also has regard for different modes of harvesting.

Second, the measure must be 'made effective in conjunction with restrictions on domestic production or consumption'. This condition aims to ensure evenhandedness in the application of an otherwise GATT-inconsistent measure; although no identical treatment is required, the measure should not place limitations only on foreign products.¹⁰⁶ In other words, the 'trade restriction must operate jointly with the restrictions on domestic production or consumption', although it is not required that the trade restrictive measure is aimed at ensuring the effectiveness of the domestic restrictions.¹⁰⁷ Considering that the Timber Regulation applies in the same way to domestic and foreign illegally logged timber and timber products, this condition appears to be fulfilled.

(iv) Article XX: Chapeau

As stated, an otherwise GATT-inconsistent measure covered by one of the policy exceptions of Article XX GATT must also satisfy the conditions of the chapeau of this provision, which aims to prevent abuse of the exceptions.¹⁰⁸ For that reason, the chapeau requires that in the application of the measure—hence the chapeau only evaluates how the measure is *applied*—(i) there may be no arbitrary discrimination between countries where the same conditions prevail, (ii) there may be no unjustifiable discrimination between countries where the same conditions prevail, and (iii) the measure may not constitute a disguised restriction on international trade.¹⁰⁹ Before addressing the compliance of the Timber Regulation with these three conditions, it must be noted that the term 'countries where the same conditions prevail' has been interpreted broadly by the AB as not only including other exporting countries but also including the importing country, independent of differences in trade volumes among exporting countries.¹¹⁰ Consequently, in the case at hand, the Timber

¹⁰⁴ *ibid.*

¹⁰⁵ Timber Regulation, recital 3. Moreover, in the context of this policy exception, the AB referred to the fact that CITES is almost universally ratified, which, in its reasoning, indicates that the policy goal of protecting forests against illegal logging is accepted. Appellate Body Report, US — Shrimp, WT/DS58/AB/R, para 135. Additionally, see C H Keong, 'The Role of CITES in Combating Illegal Logging - Current And Potential' (Online Report Series 13, TRAFFIC/WWF 2006).

¹⁰⁶ Appellate Body Report, US — Gasoline, WT/DS2/AB/R, 20-21; Appellate Body Report, US — Shrimp, WT/DS58/AB/R, para 144.

¹⁰⁷ Appellate Body Report, China — Raw Materials, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, para 356 and 360-361.

¹⁰⁸ Appellate Body Report, US — Gasoline, WT/DS2/AB/R, 22.

¹⁰⁹ Appellate Body Report, US — Shrimp (Art. 21.5 — Malaysia), WT/DS58/AB/RW, para 118.

¹¹⁰ Appellate Body Report, US — Gasoline, WT/DS2/AB/R, 23-24; Appellate Body Report, Brazil — Retreaded Tyres, WT/DS332/AB/R, paras 228-229 and 250-251.

Regulation must apply to all timber exporting countries and the EU itself without constituting a means of arbitrary or unjustifiable discrimination.

The first two conditions have been assessed both together and separately. Although, as we have argued, the treatment of timber which is governed by Article 3 of the Timber Regulation (i.e. timber covered by FLEGT or CITES) is discriminatory vis-à-vis other timber, it must be stressed that, logically, the discrimination test under the chapeau requires more than what is necessary to violate Article III GATT.¹¹¹ First, in this respect, the AB held in *US — Shrimp* that other WTO Members cannot be required to adopt an identical regulatory program to the one issued by the responding Member; hence, the different conditions in different Members must be taken into account.¹¹² Second, in *Brazil — Retreaded Tyres*, the AB held that:

'discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.'¹¹³

Thirdly, the AB has held that a WTO Member is 'expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.'¹¹⁴

With regard to the first point raised, it must be reiterated that the Timber Regulation refers back to domestic laws for the conditions of timber legality. In this respect, the measure under scrutiny in *US — Shrimp* was, in its application:

'in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy'.¹¹⁵

By making the question of legality subject to domestic laws, it seems that, indeed, the EU has fulfilled the condition set out by the AB. Hence, the Timber Regulation is likely to pass this test.¹¹⁶ As concerns the second point raised, there appears to be a rationale that is clearly related to the objective of Articles XX(b) and (g) GATT, although it may be questioned whether this is the case for Article XX(d) GATT as well. Regarding the third point, as the VPAs essentially require more from the partners than the Timber Regulation does, it would appear that in this respect the EU has not violated this condition. Furthermore, the inclusion of timber is consistent with the

¹¹¹ Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R, 23.

¹¹² Appellate Body Report, *US — Shrimp*, WT/DS58/AB/R, paras 164 and 177.

¹¹³ Appellate Body Report, *Brazil — Retreaded Tyres*, WT/DS332/AB/R, para 232.

¹¹⁴ Appellate Body Report, *US — Shrimp* (Art. 21.5 — Malaysia), WT/DS58/AB/RW, para 122.

¹¹⁵ Appellate Body Report, *US — Shrimp*, WT/DS58/AB/R, para 161.

¹¹⁶ Mitchell and Ayres argue that because the Australian Illegal Logging Prohibition Bill refers back to domestic laws it 'applies differently' depending on the local laws. This interpretation of the chapeau does not appear to differentiate between the *effect* of the measure and the *application* of the measure. It is the latter that is under scrutiny in the chapeau, not the former. In this case, although the effect indeed differs depending on the laws in the country of harvest, the application is identical for all Members as it refers back to these laws in every case. Hence, the referral to laws of the country of harvest for the legality, in our view, is not inconsistent with the chapeau. Although Stephens and Saul disagree with Mitchell and Ayres, they do so for factual reasons and do not refer to the fact that the chapeau assesses the *application* of a measure. See A Mitchell and G Ayres, 'Out of Crooked Timber: The Consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement' (2012) 29 *Environmental and Planning Law Journal* 462, 475; T Stephens and B Saul, 'Not Yet Out of the Woods: Australia's Attempt to Regulate Illegal Timber Imports and World Trade Organisation Obligations' (2012) 19 *Australian International Law Journal* 143.

Wildlife Regulation, which refers back to the multilateral CITES agreement, since an exception to the Timber Regulation leads to the same conclusion.

Exceptions to a contested measure may spark inconsistency with this condition if they differentiate between countries on a basis unrelated to the purpose of the measure.¹¹⁷ Hence, Article 3 Timber Regulation must be taken into account. As stated *supra*, this provision considers to have been legally harvested certain timber which either originates in VPA partners and is consistent with the FLEGT Regulation, or timber of species listed in Annex A, B, or C to the Wildlife Regulation. Two issues appear to be relevant. First, considering the fact that VPAs, in conjunction with the FLEGT Regulation, pursue an objective similar to that of the Timber Regulation, there appears to be no issue.¹¹⁸ The exclusion of such timber from the application of this regulation merely serves to encourage countries to enter into VPAs, which appear to go further than the Timber Regulation. The same can be said for timber which is listed in Annexes A to C of the Wildlife Regulation. In this case, at the very least an import notification and an export permit are required.¹¹⁹ Second, different legality conditions under the Timber Regulation, the VPA scheme, and the Wildlife Regulation may cause concern.¹²⁰ The conditions of legality under the VPA scheme are very similar to that under the Timber Regulation and are not an issue.¹²¹ However, under the Wildlife Regulation, timber can be imported when, as concerns legality, it is not obtained in violation of the national legislation on the conservation of the species.¹²² Hence, a more relaxed legal standard applies. This issue is the most pressing for species listed in Appendix III to CITES, as parties may unilaterally add timber to this appendix and when the party adds no reservations, the exception of Article 3 Timber Regulation comes into play. Considering these two elements together, it is possible that a Panel finds that the Timber Regulation discriminates on an arbitrary or unjustifiable basis. Nonetheless, it must be stressed that the situation at hand is very different from the one in *US — Gasoline*, *US — Shrimp*, and *Brazil — Retreaded Tyres*. The discrimination is clearly and rationally connected to the relevant policy objectives of Article XX GATT. In our opinion, the discrimination results from the fact that the

¹¹⁷ Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R, 29; Appellate Body Report, *Brazil — Retreaded Tyres*, WT/DS332/AB/R, paras 227-228.

¹¹⁸ See, for example, Voluntary Partnership Agreement between the European Union and the Republic of Cameroon on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT) [2011] OJ L92/4 (Cameroon VPA), arts 7-10 and Annex II.

¹¹⁹ It has been argued that timber species which are listed in CITES Appendix III by a country can be exported to the EU by another country, which has not listed the species in this appendix, and still benefit from the exception in Article 3. This was addressed as a loophole because a party to CITES can make unilateral changes to Appendix III. See R Cooney, S van Meibom and C H Keong, 'Trading Timbers: A Comparison of Import Requirements under CITES, FLEGT and Related EU Legislation for Timber Species in Trade' (TRAFFIC/WWF, 2012) 22-24. However, we believe this not to be a correct interpretation of Article 3 Timber Regulation, which refers back to Annex C of the Wildlife Regulation. There, it is stated that Annex C contains the species listed in Appendix III to CITES for which EU Member States have not made a reservation. However, listings in Appendix III to CITES are always linked to a country (e.g. '*Diospyros analamerensis* (Madagascar)'). Moreover, Article II CITES states that 'Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation'. Hence, we argue that the interpretation by Cooney, van Meibom, and Keong is contrary to the objectives and principles of CITES, the Wildlife Regulation, and the Timber Regulation. Nonetheless, if a Panel were to examine the Timber Regulation, this matter is likely to be examined from a practical perspective.

¹²⁰ R Cooney, S van Meibom and C H Keong, 'Trading Timbers: A Comparison of Import Requirements under CITES, FLEGT and Related EU Legislation for Timber Species in Trade' (TRAFFIC/WWF, 2012) 22-24.

¹²¹ Annex VIII Cameroon VPA, art I.

¹²² Wildlife Regulation, arts 4.1(b)(i), 4.2(c), and 4.3(a).

complex issue at hand requires multiple policy instruments at several levels in order to be WTO compliant. The existing constellation of CITES, VPAs and the Timber Regulation illustrates this. In this regard, it should be pointed out that the AB noted:

‘We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures.’¹²³

The third condition of the chapeau requires that the application of the measure contain ‘no disguised restriction on international trade’. This condition entails that the measure should not be applied in a disguised discriminatory manner, and embraces:

‘restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.’¹²⁴

Moreover, the AB held that the same considerations that led to the decision whether the measure discriminates in an arbitrary or unjustifiable manner may be taken into account in assessing whether it is a disguised restriction on trade.¹²⁵ Although factual evidence by a complainant may provide some evidence to suggest the contrary, we do not see how the Timber Regulation could be a disguised barrier to trade.

2. Agreement on Technical Barriers to Trade

Product safety standards and other technical regulations vary from country to country. The WTO’s TBT Agreement aims to ensure that technical regulations and product standards do not create unnecessary obstacles to trade, whilst also ensuring that WTO Members maintain their regulatory autonomy and are free to pursue other societal objectives, such as the protection of human health and safety and the environment.

The TBT Agreement applies to ‘technical regulations’, which according to Annex 1.1 is a:

‘document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.’

Therefore an assessment has to be made as to whether Regulation 995/2010: (i) applies to an ‘identifiable’ product or a group of products, (ii) ‘lays down’ product characteristics or related processes and production methods, and (iii) qualifies as ‘mandatory’.

First, the Timber Regulation specifies that it apply to ‘timber and timber products’ that are specifically identified by the Annex to the Timber Regulation. Therefore, we can assume that it applies to a sufficiently identifiable group of products. The second question is whether the Timber Regulation ‘lays down’ product characteristics or related processes and production methods. In this respect the Regulation is very

¹²³ Appellate Body Report, Brazil — Retreaded Tyres, WT/DS332/AB/R, para 151.

¹²⁴ Appellate Body Report, US — Gasoline, WT/DS2/AB/R, 25.

¹²⁵ *ibid*, 23.

much akin to the Australian Illegal Logging Prohibition Bill, which similarly only distinguishes between timber that has been logged legally and timber that has been logged illegally according to the legislation applicable in the country of harvest. With respect to that Bill, Mitchell and Ayres note:

‘...legality itself is not a ‘process or production method’, particularly as legal requirements will vary from country to country. Moreover, the legality of the way in which timber is harvested is not a ‘related’ non-physical characteristic because it does not relate to ‘the means of identification, the presentation or the appearance’ of the product.’¹²⁶

On this basis, we conclude that the Timber Regulation does not lay down technical regulations, and that therefore the TBT Agreement is not applicable to it.

¹²⁶ A Mitchell and G Ayres, ‘Out of Crooked Timber: The Consistency of Australia’s Illegal Logging Prohibition Bill with the WTO Agreement’ (2012) 29 Environmental and Planning Law Journal 462, 476.

IV. CONCLUSION

In this paper, we have examined the WTO-consistency of the European Union's Timber Regulation. The Regulation is the most recent contribution to the existing international regulatory framework on forestry governance. Some authors have questioned the WTO-consistency of both the U.S. Lacey Act and the Australian Illegal Logging Prohibition Bill. Similar to these examples, the aim of the Timber Regulation is to address the problem of illegal logging by introducing a prohibition on the marketing of illegally logged timber. The Regulation does not lay down any product characteristics or process and production methods and is therefore unlikely to fall within the scope of the World Trade Organization's Agreement on Technical Barriers to Trade. As the Regulation covers goods—timber—it has to fulfill the requirements set out by the General Agreement on Tariffs and Trade 1994. The authors conclude that since the Regulation only makes a distinction between legally and illegally harvested timber, it does not discriminate between 'like products' as there is no competitive relationship between these two groups of products. As such, the Regulation appears to be consistent with Articles I:1 and III:4 of the GATT. However, the Regulation makes the marketing of illegally logged timber a criminal offence and therefore creates a 'de facto' restriction on the importation of timber. Thus, the Regulation would most likely constitute a violation of Article XI GATT. The question is, however, whether the Regulation constitutes a 'border measure' (Article XI) or an 'internal measure' (Article III:4). Since the Regulation applies equally to both domestic and imported products, it is likely that it would be an internal measure and as such would be analyzed under Article III:4. Even if a violation of one of the substantive provisions of GATT 1994 were to be found by a panel, we conclude that the Regulation can most likely be justified based on Article XX GATT. Although several legal questions (as noted, questions on trade in illicit goods, likeness between legal and illegal goods, a potential disparate impact and hence de facto discrimination resulting from the due diligence requirements) remain unanswered, this paper's theoretical analysis shows that the regulatory approach taken by the EU with the Timber Regulation may well become an important technique to use the EU internal market as leverage for achieving non-trade objectives.



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Leuven Centre for Global Governance Studies
Huis De Dorlodot, Deberiotstraat 34, 3000 Leuven, Belgium
Tel. ++32 16 32 87 25
Fax ++32 16 37 35 47
info@ggs.kuleuven.be

